MAR 29 1974

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari Before Judgment to The United States Court of Appeals for the District of Columbia Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER TIIDEE PRODUCTS, INC. AND BRIEF AMICUS CURIAE

MILTON A. SMITH
General Counsel

RICHARD B. BERMAN
Labor Relations Counsel
The Chamber of Commerce of the United States of America,
1615 H Street, N.W.
Washington, D. C. 20006

GERARD C. SMETANA
Suite 6800
233 South Wacker Drive
Chicago, Illinois 60684

Attorneys for the Amicus Curiae

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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The Chamber of Commerce of the United States of America respectfully requests leave to file a brief *amicus*

curiae in support of the position of the Petitioner. In support of this motion the Chamber states:

1. The Chamber is a federation of more than 3,700 state and local chambers of commerce and trade associations, with an underlying membership of more than 3,000,000 business firms. It is the largest association of business and professional organizations in the United States. One of the Chamber's principal functions is the representation of its members' views in important labor relations litigation affecting their vital and legitimate interests.

2. The essential question presented in this case is whether the Board has the statutory power to assess litigation expenses and organizational costs to an unsuccessful respondent in a Board proceeding. Because many of the Chamber's members might be subject to substantial attorneys' fees and organizational costs under the decision of the court below, the propriety of the Board or a court assessing such costs is a matter of substantial concern to the Chamber.

3. The question at issue here thus transcends the interest of the particular parties involved and affects the interests of every litigant who is now or will in the future appear before the Board. Further, apart from its major practical impact upon all Board litigants, the question presented here involves a most important aspect of the Board's remedial power under the National Labor Relations Act and the fulfilment of the Congress' objectives in enacting this legislation. That question is thus worthy of the fullest exposition of all parties' views. In similar circumstances this Court has permitted the Chamber to file briefs *amicus curiae*. See, *e.g.*, *N.L.R.B.* v. *H. K. Porter*, 397 U.S. 99 (1970); and *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). For these reasons, the Chamber respectfully requests leave to submit the attached brief.

Respectfully submitted,

MILTON A. SMITH
General Counsel

RICHARD B. BERMAN
Labor Relations Counsel
The Chamber of
Commerce of the
United States of
America,
1615 H Street, N.W.
Washington, D. C. 20006

GERARD C. SMETANA
Suite 6800
233 South Wacker Drive
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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER TIIDEE PRODUCTS, INC.

Interest of the Amicus Curiae

The interest of the Chamber is set forth in its foregoing motion for leave to file a brief amicus curiae.

ARGUMENT

A. The Petition for Writ of Certiorari Should Be Granted And Should Be Consolidated For Argument With *National Labor Relations Board* v. *Food Store Employees Union, etc.* ("Heck's").

There are now pending before this Court two related cases raising in common a fundamental question concerning the Board's remedial powers under the National Labor Relations Act. These consist of *National Labor Relations Board* v. *Food Store Employees Union, etc.* (No. 73-370) and the instant case. The former, which was recently orally argued before this Court, involved the propriety, under the Act, of an order to the Employer, Heck's, Inc., to reimburse a union for its litigation and organizational costs and the Board for its legal costs. In that case (herein called the *Heck's* case), the Board and the union both assumed the existence of the Board's authority under the Act to award such costs. These parties differed only with respect to the propriety of such an award in that case and the authority of a reviewing court to reverse the Board's exercise of discretion in that regard. Heck's, the Employer in the case, argued,[1] however, that the Board lacked the power to impose such costs, that a court could not therefore require the Board to impose them and that the issue of the existence of that power was a necessary threshhold question which, as a matter of logic and judicial economy, required decision as a part of this Court's deliberations. The Chamber's brief, *amicus curiae*, in the Heck's case sought to sup-

[1] This point was urged in Heck's briefs to the Court. Heck's further request for leave to participate in oral argument in order to pursue its views was denied by this Court. The argument as to Heck's ultimate liability for the subject costs thus proceeded without its participation.

port the view that the Board lacked power under its statute to award litigation and organizational costs.[2]

The instant case is before this Court on petition for certiorari before judgment below because it involves precisely the issue which Heck's sought to raise in its own previously pending case. Indeed, the cases come here from the same lower court, involve the same judicial effort to restructure administrative remedies and are a product of the application by the Board of the same remedial principles. Moreover, the lower court had at one point remanded the Heck's case for reconsideration by the Board in light of that court's earlier decision in the instant case. The Board's holding in both cases resulted from the rationale expressed by the lower court in its first decision in this case. The two cases differ only in that the petition for certiorari herein specifically raises the question of the Board's power which underlies but was not expressly stated in the Board's petition in *Heck's*.

Accordingly, the two cases are inextricably interrelated and present this Court with differing factual contexts for the same challenged exercise of administrative power.[3]

Under these circumstances, this Court is urged to grant the instant petition for certiorari before judgment and to rule on the question of the Board's statutory power,

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[2] The Chamber's brief was not accepted by the Court. The union had opposed the filing of this brief solely on the ground that the matters which it discussed were not raised in the Board's petition for certiorari and were thus not before the Court. The union's contemporaneous motion to strike Heck's brief for the same reason remains pending.

[3] The factual differences in the two cases led the Board to impose extraordinary costs here but not in *Heck's*. The Board claims that it possesses the discretion to impose these costs where it deems the facts to warrant such relief. Heck's and the petitioner herein contend, however, that the Board can have no discretion where it lacks statutory power or authority.

both as sought here and by Heck's. Inasmuch as the aggrieved Employer was not heard on this issue in Heck's, it appears appropriate that the decision in that case be limited to the general question of a reviewing court's authority to substitute its remedial views for that of the Board, and without addressing the merits of the particular remedy involved both there and here. Such a result would permit this Court to consider that remedy in this case, in which Heck's, as well as the parties here, may be given an opportunity to urge their views; that is, the two cases should be consolidated for argument on the question of the Board's statutory power to impose litigation and organizational expenses in order to remedy unfair labor practices. That would afford this Court the most thorough and careful airing of a most important question in the administration of the Act while it afforded an opportunity to be heard to those whose interests are now in jeopardy through litigation.

B. The Board Lacks Statutory Power Or Warrant To Impose Litigation And Organizational Costs As A Remedy In Unfair Labor Practice Cases.

Both the Board and the Courts are statutorily limited by the Act in the remedies which they may prescribe. The threshold question in the case, accordingly, is whether the Act allows the Board, in the first instance, to grant a reimbursement, to either the Board and/or a charging party, of litigation expenses or additional organizational costs. For it follows *a fortiori* that, if the Board is so limited, the Act likewise limits the courts from granting such relief. The question of the appropriate tribunal to grant such a remedy—the primary question presented by the Board and the Union—is academic when, as Heck's and the Chamber contend, neither tribunal has such power under the Act. This Court has repeatedly emphasized that the Act, and not the Board or the courts, is the ultimate limiting factor in determining what remedies can

be meted out by the Board in correcting unfair labor practices. As this Court cautioned in *Nathanson* v. *N.L.R.B.*, 344 U.S. 23, 29 (1952), in overruling a Court of Appeals' decision approving the Board's determination that the Act permitted back pay claims to be given priority in bankruptcy proceedings, "[W]hether that should be done is a legislative decision".[4]

2. Unlike the federal courts, the Board has no inherent equitable powers; the Board, like other administrative agencies, is "entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." *C.A.B.* v. *Delta Air Lines*, 367 U. S. 316 (1961).

This Court has repeatedly emphasized that punitive relief, such as that imposed by the court below, is ". . . clearly not granted to the Board by the Federal Acts." *International Union, U.A.W.* v. *Russell*, 356 U. S. 634, 646 (1958); *Republic Steel Corporation* v. *N.L.R.B.*, 311 U. S. 7, 10-12 (1940). To the contrary, remedies imposed by the Board must be remedial in nature. See Morris, *The Developing Labor Law*, Bureau of National Affairs, Inc. (Washington, D. C. 1971), p. 844. Furthermore, the Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with backpay. *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, 605 (1954). Accordingly, those persons seeking full compensatory relief must look elsewhere "since such items of recovery are beyond the scope of present board remedial orders." *U.A.W.* v. *Russell*, at 646.[5]

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[4] See also *H. K. Porter* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Switchmens Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); and *Commissioner* v. *Brown*, 380 U.S. 563, 579 (1964).

[5] Thus, in *Operating Engineers Local 513*, 145 NLRB 554 (1963), the Board denied backpay to employees for lost work time caused

Attorneys's fees and organizational costs must be considered punitive and collateral and beyond the Board's powers. Such relief will not make employees whole for any losses they have suffered. Inasmuch as such relief will be discriminatorily handed out, it can only be regarded as punishment to the respondent in those cases where the Board or the courts are of the opinion that the respondent has engaged, as found here by the court below, in "clearly aggravated or pervasive misconduct" and "flagrant repetition of conduct previously found unlawful." *Food Store Employees Union Local No. 347* v. *N.L.R.B.*, 476 F. 2d 546, 551 (D. C. Cir. 1973). Since such relief will issue to deter future conduct, and not to make employees whole for any losses they have suffered, organizational costs and litigation expenses must, it is submitted, be considered punitive and beyond the Board's powers.

The conclusion that the statute permits the Board to impose, as a monetary remedy, only back pay to aggrieved employees derives support not only from the majority opinion in *Republic Steel, supra*, but as well from the dissent in which Mr. Justice Black and Mr. Justice Douglas concluded:

> It might fairly be implied by the words 'reinstatement of employees with or without backpay' that the employees must themselves be the recipients of the back pay. Were the opinion based on that ground we would acquiesce.

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by the physical assault of union agents, and in *St. Clair* v. *Teamsters Local 515*, 442 F.2d 128 (6th Cir. 1969), collateral injuries, such as the loss of a home for inability to make mortgage payments, were deemed beyond the Board's remedial powers. An employer's business losses occasioned by unlawful strikes or picketing would also be denied in an unfair labor practice proceeding. In short, "collateral losses are not considered in framing a reimbursement order." *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7, 11-12 (1940),

3. The power to order the reimbursement of litigation expenses cannot be implied. It must be grounded on the express language of the law. *Fleishmann Corporation* v. *Maier Brewing Co.*, 386 U. S. 714, 720 (1967). The National Labor Relations Act, however, contains no such express provision, as exists under a variety of federal regulatory laws,[6] including those in the field of labor relations,[7] nor even a provision as in *Fleishmann* providing for the "costs of the action" which, notwithstanding the "deliberate" and "willful" violations there involved, was deemed insufficient to permit such an award. Indeed, an analysis of the legislative history of both the Wagner and Taft-Hartley Acts indicates that Congress squarely faced the question of damage awards and concluded that such a remedy was inappropriate to Board proceedings.

While the initial version of the National Labor Relations Act provided that violators "pay damages" to remedy their unfair labor practices,[8] these words were

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[6] See, e.g., Clayton Act, § 4, 15 U.S.C. § 15; Communications Act of 1934, § 206, 47 U.S.C. § 206; Copyright Act, 17 U.S.C. § 116; Interstate Commerce Act, § 16, 49 U.S.C. § 16(2); Packers and Stockyards Act, § 309(f), 7 U.S.C. § 210(f); Perishable Agricultural Commodities Act, § 7(b), 7 U.S.C. § 499g(b); Securities Act of 1933, § 11(c), 15 U.S.C. § 77k(e); Securities Exchange Act of 1934, §§ 9(e), 18(a), 15 U.S.C. §§ 78i(e), 78r(a); Servicemen's Readjustment Act 38 U.S.C. § 1822(b); and Trust Indenture Act, §§ 323(a), 53 Stat. 1176, 15 U.S.C. § 77www(a).

[7] See, *e.g.*, Civil Rights Act of 1964, as amended, §§ 706(k), 42 U.S.C. 2000e-5(k); Fair Labor Standards Act §§ 16(b), 29 U.S.C. §§ 216(b); Railway Labor Act, § 3(p) 45 U.S.C. § 153(p). Significantly, even the substantially stronger language of Section 303 of the Labor Act, which allows any person injured by an unlawful secondary boycott to "recover the damages by him sustained and *the cost of the suit*" (emphasis added), has been consistently construed as not *authorizing* the prevailing party to recover attorneys fees. See, *e.g.*, *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260, n. 16 (1964).

[8] Cong. Rec. 3445 (1934).

deleted by the Committee on Education and Labor.[9] A year later, in 1935, the Committee[10] also deleted words from a second version of the Act which would have empowered the Board to require "restitution."[11] The remedial provisions of the Act were thereupon amended to read as they now do, with the Board authorized "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act."[12]

Equally significant in determining the legislative intent to prevent the Board from awarding damages is the discussion surrounding Section 303[13] which provides for a damage remedy in Federal District Court. Senator Taft who sponsored this section stated that damage relief was necessary since litigants could not bring an action for damages before the Board. In Taft's words:

> "[I]t is not felt, I think, by any of those on the other side of these questions that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. I do not think anyone felt that that particular function should be in the Board."[14]

It must be presumed, therefore, that had Congress intended to confer upon the Board or courts the extraordinary

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[9] S. Rep. No. 1184, 73 Cong., 2d Sess (1934) at 3.

[10] Senate Comm. on Education and Labor, 74th Cong., 1st Sess., Memorandum Comparing S. 1958 as a substitute for S. 2925, 34 (Comm. Print, 1935).

[11] S. 1958, 74th Cong., 1st Sess. (1935).

[12] S. Rep. No. 573, 74th Cong., 1st Sess., 15 (1935). See McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with the National Labor Policy?* 14 Wayne L. Rev. 1086 at 1092 n. 38 (1968).

[13] 29 U.S.C. Sec. 187.

[14] 93 Cong. Rec. 4854 (1947).

powers here involved, such powers would have expressly been granted as in the case of other agencies [15] or as in the case of federal appellate litigation.[16] "It may well be true," as this Court observed of a similarly broad reading of the Board's remedial powers in *H. K. Porter* v. *N.L.R.B.*, 399 U. S. 99 (1970), "that the present remedial powers are insufficiently broad to cope with important labor problems," but, "it is the job of Congress, not the Board or the Courts . . ." to correct such alleged deficiencies.

4. In *Hall* v. *Cole*, 412 U.S. 1 (1973) this Court held that litigation costs may be shifted to the unsuccessful litigant where a controlling statute so directs. However, as stated, an analysis of the Act demonstrates that the Board is not statutorily authorized to shift these costs. Although this Court also observed that even absent specific statutory mandate, a Federal Court exercising its equitable power, may award counsel fees when the interests of justice so require, this inherent equitable power does not extend to the Board or to other administrative agencies. Rather, as stated agencies such as the Board may exercise only powers expressly bestowed upon them by statute. See 1 Am. Jur. 2d. Administrative Law, Section 72; *H. K. Porter* v. *N.L.R.B.*, 397 U.S. 99 (1970).

In addition, under the rationale of *Hall* absent statutory authorization, litigation costs may be shifted only when the unsuccessful party has been guilty of contemptuous conduct; or where the litigation has bestowed a "substantial benefit on the members of an ascertainable class . . ."; or where the successful plaintiff is acting as a "private attorney general". These three considerations do not exist in this case. No class exists within the mean-

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[15] See notes 3 and 4, *supra*.

[16] See, *e.g.*, 28 U.S.C. § 1912 permitting federal courts of appeals or this Court to assess single or double damages against the losing party.

ing of *Hall* or *Mills v. Electric Auto Lite Co.*;[17] there is no need to vindicate public rights by the litigation of a "private attorney general"; there has been no contemptible conduct. Consequently, there is neither statutory authorization nor any equitable basis to shift counsel costs in this case.[18]

Respectfully submitted,

MILTON A. SMITH
General Counsel

RICHARD B. BERMAN
Labor Relations Counsel
The Chamber of
Commerce of the
United States of
America,
1615 H Street, N.W.
Washington, D. C. 20006

GERARD C. SMETANA
Suite 6800
233 South Wacker Drive
Chicago, Illinois 60684

Attorneys for the
Amicus Curiae

[17] 396 U.S. 375, 393-394.

[18] For the reasons expressed in the text, the general rule disfavoring attorneys fees should be applied. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. at 717, 718.